

STATE OF MICHIGAN
COURT OF APPEALS

GERALD BURTON,

Plaintiff-Appellee,

v

WATERFORD TOWNSHIP,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 274332

Oakland Circuit Court

LC No. 2006-073293-NO

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court order denying its motion for summary disposition on the basis of on governmental immunity. We reverse and remand for entry of judgment in favor of defendant. This appeal is being decided without oral argument. MCR 7.214(E).

Plaintiff lost control of his bicycle when the tires slipped on mud or algae that had accumulated on a sidewalk under a large puddle of standing water. According to plaintiff's expert, the sidewalk was defective because it was not "pitched" so that water would run off the sidewalk and onto the adjacent grassy area. Instead, there was a low-lying depression in the sidewalk where water and muck could accumulate because of the inadequate drainage. The circuit court ruled that there was an issue of fact concerning whether the sidewalk was defective.

The circuit court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). "The applicability of governmental immunity is a question of law that is also reviewed de novo on appeal." *Martin v Rapid Inter-Urban Transit Partnership*, 271 Mich App 492, 496; 722 NW2d 262 (2006).

A governmental agency having jurisdiction over a highway is liable in tort for breach of the duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). The term "highway" is defined to include sidewalks. MCL 691.1401(e). A governmental entity owes the duty to keep a highway in reasonable repair; however, there is no duty to keep a highway reasonably safe. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 160; 615 NW2d 702 (2000).

Defendant contends that this case is controlled by *Haliw v Sterling Hts*, 464 Mich 297; 627 NW2d 581 (2001), and that because there was no evidence that the defect in the sidewalk

itself caused plaintiff's injury, the highway exception to governmental immunity does not apply. We agree. In *Haliw*, the plaintiff slipped and fell on a patch of ice that had formed in a depression in the sidewalk. *Id.* at 299. Although the precise issue before the Court was the application of the natural accumulation rule, the Court stated that to recover under the highway exception, the plaintiff was required show that her injuries were proximately caused by a defect in the sidewalk itself or by a combination of that defect and the accumulation, as opposed to by the accumulation alone. *Id.* at 308-311. The Court explained that there must be a "persistent defect" in the sidewalk that renders it "unsafe for public travel at all times, and which combines with the natural accumulation of ice or snow to proximately cause injury" in order for a municipality to be held liable. *Id.* at 312. If the plaintiff's "injury is due solely to the presence of ice on the sidewalk," the municipality is not liable, "even if a depression in the sidewalk caused the accumulation." *Id.* at 311 n 11.

Under *Haliw*, it is insufficient for a plaintiff to show that his or her injuries were caused by the presence of an accumulated substance on the sidewalk, even if that accumulation was itself occasioned by a depression in the sidewalk. Regardless whether the natural accumulation doctrine precisely extends to water and mud, *Haliw* provides that a plaintiff must prove that his or her injuries resulted directly, rather than indirectly, from a "persistent defect" inherent in the structure of the sidewalk itself.

In the present case, there was no "persistent defect" in the sidewalk that rendered it "unsafe for public travel at all times." *Id.* at 312. Instead, it was merely demonstrated that an accumulation of water and mud had collected in or around a sidewalk depression, and that the water and mud caused plaintiff's accident. In other words, while the depression may have indirectly led to the accident, reasonable minds could not conclude that a structural defect itself was the direct cause of plaintiff's injuries. Simply put, because there was no showing that the depression in the sidewalk was a "persistent defect" that directly caused plaintiff's injuries, summary disposition should have been granted in favor of defendant on the basis of governmental immunity. *Id.* at 311-312.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello